

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

Plaintiff,

v.

BALDWINVILLE PRODUCTS, INC. and  
ERVING INDUSTRIES, INC.,

Defendants.

Civil Action No. \_\_\_\_\_

CONSENT DECREE

## TABLE OF CONTENTS

I.	<u>BACKGROUND</u> .....	3
II.	<u>JURISDICTION</u> .....	3
III.	<u>PARTIES BOUND</u> .....	3
IV.	<u>DEFINITIONS</u> .....	4
V.	<u>STATEMENT OF PURPOSE</u> .....	5
VI.	<u>PAYMENT, INS. CLAIMS &amp; PERFORMANCE OF WORK</u> .....	5
VII.	<u>FAILURE TO COMPLY WITH CONSENT DECREE</u> .....	6
VIII.	<u>COVENANT NOT TO SUE BY PLAINTIFF</u> .....	7
IX.	<u>RESERVATION OF RIGHTS BY UNITED STATES</u> .....	8
X.	<u>COVENANT NOT TO SUE BY SETTLING DEFENDANTS</u> .....	8
XI.	<u>EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION</u> .....	9
XII.	<u>ACCESS TO INFORMATION</u> .....	10
XIII.	<u>RETENTION OF RECORDS</u> .....	11
XIV.	<u>NOTICES AND SUBMISSIONS</u> .....	12
XV.	<u>DISPUTE RESOLUTION</u> .....	12
XVI.	<u>RETENTION OF JURISDICTION</u> .....	15
XVII.	<u>INTEGRATION/APPENDICES</u> .....	15
XVIII.	<u>LODGING AND OPPORTUNITY FOR PUBLIC COMMENT</u> .....	15
XIV.	<u>SIGNATORIES/SERVICE</u> .....	15
XX.	<u>FINAL JUDGMENT</u> .....	16

## **I. BACKGROUND**

A. The United States of America ("United States"), and at the request of the Secretary of the Department of Defense, through the United States Army Corps of Engineers ("Corps"), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § § 9606 and 9607, as amended ("CERCLA"), seeking injunctive relief, a declaratory judgment, and reimbursement of response costs incurred or to be incurred for response actions taken or to be taken at or in connection with the release or threatened release of hazardous substances at the Birch Hill Dam Site in Worcester, County, Massachusetts ("the Site").

B. The defendants that have entered into this Consent Decree ("Settling Defendants") do not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the complaint.

C. The United States has reviewed the Financial Information submitted by Settling Defendants and met with the Chief Financial Officer of the Settling Defendants to determine whether Settling Defendants are financially able to pay response costs incurred and to be incurred at the Site. Based upon this meeting and the Financial Information, the United States has determined that Settling Defendants are able to pay the amount and undertake the Sampling Work as specified in Section VI of this Consent Decree.

D. Liability insurance policies, including but not limited to comprehensive, primary, umbrella, and excess policies, may have been or were issued to or for the benefit of the Settling Defendants or any predecessor in interest to the Settling Defendants, including but not limited to policies for which the Settling Defendants or any predecessor is an "insured," "named insured," or "additional insured," (collectively "Insurance Policies"), which Insurance Policies, if located, may provide coverage for all or part of the claims the United States is making against the Settling Defendants.

E. The Massachusetts Department of Environmental Protection ("MassDEP") and the Settling Defendants have entered into an Administrative Consent Order and Notice of Noncompliance regarding the Site, file no. ACO-CE-06-3T003; Release Tracking No. 2-0000664 ("AOC"). Under the AOC, the Settling Defendants agree to undertake certain investigative and planning work at the Site pursuant to Massachusetts environmental regulations.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

## **II. JURISDICTION**

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9606, 9607 and 9613(b) and also has personal jurisdiction

over Settling Defendants. Settling Defendants consent to and shall not challenge entry of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

### **III. PARTIES BOUND**

2. This Consent Decree is binding upon the United States, and upon Settling Defendants and their current or former officers, shareholders, directors, employees, and their successors and assigns. Any change in ownership or corporate or other legal status, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendants under this Consent Decree.

### **IV. DEFINITIONS**

3. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

b. "Consent Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, this Consent Decree shall control.

c. "Corps" shall mean the United States Army Corps of Engineers, and any successor departments, agencies or instrumentalities of the Corps.

d. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

e. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.

f. 1. "Financial Information" shall mean those financial documents identified in Appendix A.

2. "Insurance Information" shall mean the insurance documentation identified in Appendix B.

g. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate

of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

h. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

i. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that the Corps or DOJ on behalf of the Corps has paid at or in connection with the Site through October 1, 2006, plus accrued Interest on all such costs through such date.

j. "Parties" shall mean the United States, and the Settling Defendants.

k. "Plaintiff" shall mean the United States.

l. "RCRA" shall mean the Solid Waste Disposal Act, 42 U.S.C. § 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

m. "Sampling Work" shall mean certain monitoring work to be undertaken by Settling Defendants as described in more detail in the Statement of Work attached hereto as Appendix C.

n. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

o. "Settling Defendants" shall mean Baldwinville Products, Inc. and Erving Industries, Inc.

p. "Site" shall mean the Birch Hill Dam Site, encompassing approximately 4,396 acres, located on the Millers River, downstream of the confluence of the Millers and Otter Rivers, and in the towns of Royalson, Winchendon and Templeton, in Worcester County, Massachusetts, and generally shown on the map included in Appendix D.

q. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

## **V. STATEMENT OF PURPOSE**

4. By entering into this Consent Decree, the mutual objectives of the Parties are for the Settling Defendants to implement the Sampling Work at the Site, to make a cash payment and to assign their rights to claims proceeds from the Insurance Policies to the United States to resolve their liability for Past Response Costs as provided in the Covenant Not to Sue by Plaintiff in Section VIII, and subject to the Reservations of Rights by United States in Section IX.

## **VI. PAYMENT OF RESPONSE COSTS, ASSIGNMENT OF INSURANCE CLAIMS, AND PERFORMANCE OF SAMPLING WORK**

5. a. Within 30 days of entry of this Consent Decree, Settling Defendants shall pay to the Corps \$215,000, plus an additional sum for Interest on that amount calculated November 1, 2006 through the date of payment.

b. Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number \_\_\_\_\_, Army Regional Code E6, and DOJ Case Number 90-11-3-1728. Payment shall be made in accordance with instructions provided to Settling Defendants by the Financial Litigation Unit of the U.S. Attorney's Office in the District of Massachusetts following lodging of the Consent Decree. Any payment received by the Department of Justice after 4:00 p.m. Eastern Time shall be credited on the next business day. The total amount to be paid pursuant to Paragraph 5.a shall be deposited in the United States Treasury.

6. At the time of payment, Settling Defendants shall send notice that payment has been made to the Corps and DOJ in accordance with Section XIV (Notices and Submissions).

7. The Settling Defendants shall undertake the Sampling Work as set forth in Appendix C hereto.

8. Upon the date of entry of this Consent Decree, Settling Defendants shall be deemed to have assigned irrevocably to the United States such rights and potential rights as Settling Defendants may have or may in the future have under the Insurance Policies to recover all or any portion of payment made pursuant to Paragraph 5 of this Consent Decree or costs incurred pursuant to the AOC (as described in Section I.E., above) up to the amount of the United States' unreimbursed Past Response Costs. The Settling Defendants further agree to execute all necessary documentation to effectuate this assignment and to allow and cooperate with the pursuit and collection by the United States or its designee of any claims proceeds under the Insurance Policies pursuant to this assignment. Settling Defendants expressly reserve all other rights under the Insurance Policies.

## **VII. FAILURE TO COMPLY WITH CONSENT DECREE**

9. Interest on Late Payments. If Settling Defendants fail to make any payment under Paragraph 5 by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

10. Stipulated Penalty.

a.i. If any amounts due under Paragraph 5 are not paid by the required date, Settling Defendants shall be in violation of this Consent Decree and shall pay, as a stipulated

penalty, in addition to the Interest required by Paragraph 9, \$500.00 per violation per day that such payment is late.

a. ii. If Settling Defendants do not comply with the obligations set forth in Paragraph 7 of this Consent Decree, Settling Defendants shall be in violation of this Consent Decree and shall pay to the Corps, as a stipulated penalty, \$750.00 per violation per day of such noncompliance.

b. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by the Corps. All payments to the Corps under this Paragraph shall be identified as "stipulated penalties" and shall be made in accordance with instructions provided by the Corps. The check, or a letter accompanying the check, shall reference the name and address of the party making payment, the Site name, and DOJ Case Number 90-11-3-1728.

c. At the time of each payment, Settling Defendants shall send notice that payment has been made to the Corps and DOJ in accordance with Section XIV (Notices and Submissions).

d. Penalties shall accrue as provided in this Paragraph regardless of whether the Corps has notified Settling Defendants of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment or performance is due or the day a violation occurs and shall continue to accrue through the date of payment or the final day of correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

11. If the United States brings an action to enforce this Consent Decree, Settling Defendants shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

12. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of Settling Defendants' failure to comply with the requirements of this Consent Decree.

13. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse Settling Defendants from payment as required by Section VI or from performance of any other requirements of this Consent Decree.

#### **VIII. COVENANT NOT TO SUE BY PLAINTIFF**

14. Except as specifically provided in Section IX (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), with regard to Past Response Costs. This covenant shall take effect upon receipt by the Corps of all amounts required by Section VI (Payment of Response Costs and Performance of Sampling Work) and any amount due under Section VII (Failure to Comply with Consent Decree). This covenant not to sue is conditioned upon the satisfactory performance by Settling Defendants of their obligations under the AOC, and this Consent Decree, including, but not limited to, completion of the Sampling Work, in accordance with the terms of this Consent Decree, and cooperation in addressing inquiries by insurers, and execution of all necessary agreements to allow the pursuit, and collection by the United States or its designee, of insurance claims proceeds. This covenant not to sue is also conditioned upon the veracity and completeness of the Financial Information provided to the Corps by Settling Defendants. If the Financial Information is subsequently determined by the Corps to be false or, in any material respect, inaccurate, Settling Defendants shall forfeit all payments made pursuant to this Consent Decree and this covenant not to sue and the contribution protection in Paragraph 21 shall be null and void. Such forfeiture shall not constitute liquidated damages and shall not in any way foreclose the United States' right to pursue any other causes of action arising from Settling Defendants' false or materially inaccurate information. This covenant not to sue extends only to Settling Defendants and does not extend to any other person.

#### **IX. RESERVATION OF RIGHTS BY UNITED STATES**

15. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all matters not expressly included within the Covenant Not to Sue by United States in Paragraph 14. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendants with respect to:

- a. liability for failure of Settling Defendants to meet a requirement of this Consent Decree;
- b. criminal liability;
- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- d. liability, based upon Settling Defendants' ownership or operation of the Site, or upon Settling Defendants' transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Consent Decree by Settling Defendants; and



e. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.

f. liability for costs that the United States incurs relating to the Site that are not within the definition of Past Costs.

16. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to reinstitute or reopen this action, or to commence a new action seeking relief other than as provided in this Consent Decree, if the Financial Information provided by Settling Defendants, or the financial certification made by Settling Defendants in Paragraph 29, is false or, in an material respect, inaccurate.

#### **X. COVENANT NOT TO SUE BY SETTLING DEFENDANTS**

17. Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Past Response Costs, the Sampling Work, or this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Constitution of the Commonwealth of Massachusetts, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Past Response Costs, and/or the Sampling Work.

Except as provided in Paragraph 19 (Waiver of Claims) and Paragraph 23 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States brings a cause of action pursuant to the reservations set forth in Paragraph 15a-e, but only to the extent that Settling Defendants' claims arise from the same response action or response costs that the United States is seeking pursuant to the applicable reservation.

18. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

19. Settling Defendants agree not to assert any CERCLA claims or causes of action that it may have for all matters relating to the Past Response Costs and the Sampling Work, including for contribution, against any other person.

#### **XI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

20. Except as provided in Paragraph 19, nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Decree may have under applicable law. Except as provided in Paragraph 19, the Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

21. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendants are entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are Past Response Costs and Sampling Work. The "matters addressed" in this Consent Decree do not include those response costs or response actions as to which the United States has reserved its rights under this Consent Decree (except for claims for failure to comply with this Decree), in the event that the United States asserts rights against Settling Defendants coming within the scope of such reservations.

22. Settling Defendants agree that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify the Corps and DOJ in writing no later than 60 days prior to the initiation of such suit or claim. Settling Defendants also agree that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify the Corps and DOJ in writing within 10 days of service of the complaint or claim upon it. In addition, Settling Defendants shall notify the Corps and DOJ within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

23. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by Plaintiff set forth in Section VIII.

## **XII. ACCESS TO INFORMATION**

24. a. Settling Defendants shall provide to the Corps, upon request, copies of all records, reports, or information (hereinafter referred to as "records") within their possession or control or that of their contractors or agents relating to activities at the Site, or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, receipts, reports, correspondence, or other documents or information related to the Site.

b. Settling Defendants shall provide to the Corps copies of all records, reports, or information (hereinafter referred to as "records") within their possession or control or that of their contractors or agents relating to the implementation of the SOW, including, but not limited to, sampling, analysis, chain of custody records, manifests, receipts, reports, correspondence, or other documents or information related to the SOW.

### **25. Confidential Business Information and Privileged Documents.**

a. Settling Defendants may assert business confidentiality claims covering part or all of the records submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. 2.203(b). Records determined to be confidential by the Corps will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies records when they are submitted to the Corps, or if the Corps has notified Settling Defendants that the records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such records without further notice to Settling Defendants.

b. Settling Defendants may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If a Settling Defendant asserts such a privilege in lieu of providing records, it shall provide Plaintiff with the following: 1) the title of the record; 2) the date of the record; 3) the name and title of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. However, no records created or generated pursuant to the requirements of this or any other settlement with the United States shall be withheld on the grounds that they are privileged.

26. No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other records evidencing conditions at or around the Site.

## **XIII. RETENTION OF RECORDS**

27. Until 10 years after the entry of this Consent Decree, Settling Defendants shall preserve and retain all records now in their possession or control, or which come into their

possession or control, that relate in any manner to response actions taken at the Site or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

28. After the conclusion of the document retention period in the preceding paragraph, Settling Defendants shall notify the Corps and DOJ at least 90 days prior to the destruction of any such records, and, upon request by the Corps or DOJ, Settling Defendants shall deliver any such records to the Corps. Settling Defendants may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendants assert such a privilege, it shall provide Plaintiff with the following: 1) the title of the record; 2) the date of the record; 3) the name and title of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. However, no records created or generated pursuant to the requirements of this or any other settlement with the United States shall be withheld on the grounds that they are privileged.

29. Settling Defendants hereby certify that, to the best of their knowledge and belief, after thorough inquiry, they have:

a. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or other information relating to their potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site, and that it has fully complied with any and all the Corps requests for information regarding the Site and Settling Defendants' financial circumstances pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927; and

b. submitted to the Corps Financial Information that fairly, accurately, and materially sets forth their financial circumstances, and that those circumstances have not materially changed between the time the Financial Information was submitted to the Corps and the time Settling Defendants execute this Consent Decree.

c. submitted to the Corps Insurance Information that fairly, accurately, and materially sets forth relevant information pertaining to insurance coverage, or potential insurance coverage, if any, for payments made pursuant to Paragraph 5 of this Consent Decree or costs incurred pursuant to the AOC (as described in Section I.E., above).

#### **XIV. NOTICES AND SUBMISSIONS**

30. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete

satisfaction of any written notice requirement of the Consent Decree with respect to the United States, the Corps, DOJ, and Settling Defendants, respectively.

As to DOJ:

Bruce Gelber  
Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice (DJ #90-11-3-1728)  
P.O. Box 7611  
Washington, D.C. 20044-7611

As to the Corps:

Joseph P. McInerney  
Deputy District Counsel  
U.S. Army Corps of Engineers  
New England District  
696 Virginia Road  
Concord, MA 01742-2751

R. Bruce Williams  
Environmental Manager  
Construction/Operations Division  
U.S. Army Corps of Engineers  
New England District  
696 Virginia Road  
Concord, MA 01742-2751

Wesley C. Miller  
Director, RM (CERM-Z)  
U.S. Army Corps of Engineers, Headquarters  
441 G Street, NW  
Washington, DC 20314

As to Settling Defendants:

Denis Emmett, CFO  
Erving Industries, Inc.  
97 East Main Street  
Erving, MA 01344

and

Jonathan Tamkin, Esquire  
Tamkin & Hochberg, LLP  
313 Washington Street, Suite 202  
Newton, MA 02458

## **XV. DISPUTE RESOLUTION**

31. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of the Settling Defendant that have not been disputed in accordance with this Section.

32. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute.

### **33. Statements of Position.**

a. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by the Corps shall be considered binding unless, within 30 days after the conclusion of the informal negotiation period, Settling Defendants invoke the formal dispute resolution procedures of this Section by serving on the United States, as set forth in the Notices and Submissions section of this Consent Decree, a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the Settling Defendants. The Statement of Position shall specify the Settling Defendants' position as to whether formal dispute resolution should proceed under Paragraph 34 or 35.

b. Within 45 days after receipt of Settling Defendants' Statement of Position, the Corps will serve on Settling Defendants its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by the Corps. The Corps' Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 34 or 35. Within 45 days after receipt of the Corps' Statement of Position, Settling Defendants may submit a Reply.

c. If there is disagreement between the Corps and the Settling Defendants as to whether dispute resolution should proceed under Paragraph 34 or 35, the parties to the dispute shall follow the procedures set forth in the Paragraph determined by the Corps to be applicable.

However, if the Corps ultimately appeals to the Court to resolve the dispute, the Court shall determine which Paragraph is applicable in accordance with the standards of applicability set forth in Paragraph 34 and 35.

34. Formal dispute resolution for disputes pertaining to the adequacy of the Sampling Work shall be reviewed on the administrative record pursuant to the procedures set forth in this Paragraph. All other disputes that are accorded review on the administrative record under applicable principles of administrative law shall also be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of the Sampling Work includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by the Corps under this Consent Decree; and (2) the adequacy of the performance of the Sampling Work taken pursuant to this Consent Decree.

a. An administrative record of the dispute shall be maintained by the Corps and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, the Corps may allow submission of supplemental statements of position by the parties to the dispute.

b. The Corps will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 34a. This decision shall be binding upon the Settling Defendants, subject only to the right to seek judicial review pursuant to Paragraph 34c and 34d.

c. Any administrative decision made by the Corps pursuant to Paragraph 34b shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by the Settling Defendant with the Court and served on all Parties within 10 days of receipt of the Corps' decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to Settling Defendant's motion. The parties agree that the administrative record shall include the material described in Paragraph 34a, and that no additional matters or issues may be raised or argued to the Court.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendants shall have the burden of demonstrating that the decision of the Corps is arbitrary and capricious or otherwise not in accordance with law. Judicial review of the Corps' decision shall be on the administrative record compiled pursuant to Paragraph 34a.

35. Formal dispute resolution for disputes that neither pertain to the adequacy of the Sampling Work nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of Settling Defendants' Statement of Position submitted pursuant to Paragraph 33a, the Corp will issue a final decision resolving the dispute. The Corps' decision shall be binding on the Settling Defendants unless, within 10 days of receipt of the decision, the Settling Defendants file with the Court and serve on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States may file a response to Settling Defendants' motion. The parties agree that only the matters or issues previously considered with respect to such dispute may be raised to the Court.

b. Judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

36. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Settling Defendants under this Consent Decree, not directly in dispute, unless the Corps or the Court agree(s) otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Settling Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section VII (Failure to Comply with Consent Decree).

#### **XVI. RETENTION OF JURISDICTION**

37. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

#### **XVII. INTEGRATION/APPENDICES**

38. This Consent Decree and its appendices constitute the final, complete and exclusive Consent Decree and understanding between the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendices are attached to and incorporated into this Consent Decree:

Appendix A is a list of the financial documents submitted to the Corps by Settling Defendants;

Appendix B is a chart of the insurance information submitted to the Corps by Settling Defendants;



Appendix C is the Statement of Work describing certain sampling work to be undertaken by Settling Defendants at the Site; and

Appendix D is a map of the Site.

### **XVIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

39. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

40. If for any reason this Court should decline to approve this Consent Decree in the form presented, this Consent Decree is voidable at the sole discretion of any party and the terms of the Consent Decree may not be used as evidence in any litigation between the Parties.

### **XIX. SIGNATORIES/SERVICE**

41. Each undersigned representative of each Settling Defendant to this Consent Decree and the Deputy Section Chief for the Environmental Enforcement Section of the United States Department of Justice certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

42. Settling Defendants hereby agree not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendants in writing that it no longer supports entry of the Consent Decree.

43. Settling Defendants shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on their behalf with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons. The Parties agree that Settling Defendants need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

### **XX. FINAL JUDGMENT**

44. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between the United States and Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

## **XXI. MODIFICATION**

45. The terms of this Consent Decree may be modified only by a subsequent agreement signed by the Parties. Where the modification constitutes a material change to the terms of the Consent Decree, such modification shall be effective only upon approval from the Court.

SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 2\_\_\_\_.

\_\_\_\_\_  
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Baldwinville Products, Inc. et al., relating to the Birch Hill Dam Site.

FOR THE UNITED STATES OF AMERICA,

MATTHEW McKEOWN  
Acting Assistant Attorney General  
Environment and Natural Resources Division

---

Bruce S. Gelber  
Section Chief  
Environmental Enforcement Section  
United States Department of Justice  
Washington, D.C. 20530

---

Catherine Adams Fiske  
Trial Attorney  
Environmental Enforcement Section  
United States Department of Justice  
Boston Field Office  
One Gateway Center, Suite 616  
Newton, MA 02458  
addie.fiske@usdoj.gov  
(617) 450-0444

Michael Loucks  
Acting United States Attorney  
District of Massachusetts

George B. Henderson, II  
Assistant United States Attorney  
District of Massachusetts  
United States Courthouse, Suite 9200  
1 Courthouse Way  
Boston, MA 02210  
(617) 748-3272

Of Counsel

Joseph P. McInerny  
Deputy District Counsel  
U.S. Army Corps of Engineers  
New England District  
696 Virginia Road  
Concord, MA 01742-2751

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Baldwinville Products, Inc. et al., relating to the Birch Hill Dam Site.

FOR DEFENDANT BALDWINVILLE PRODUCTS INC.

\_\_\_\_\_  
Date: \_\_\_\_\_  
Morris Housen, President  
97 East Main Street  
Erving, MA 01344

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: Christopher B. Myhrum  
Title: Outside Counsel  
Address: Bulkley, Richardson and Gelinas, LLP  
1500 Main Street, Suite 2700  
Springfield, MA 01115-5507

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Baldwinville Products, Inc. et al., relating to the Birch Hill Dam Site.

FOR DEFENDANT ERVING INDUSTRIES, INC.

Date: \_\_\_\_\_

Morris Housen  
President  
Erving Industries, Inc.  
97 East Main Street  
Erving, MA 01344

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: Christopher B. Myhrum

Title: Outside Counsel

Address: Bulkley, Richardson and Gelinas, LLP  
1500 Main Street, Suite 2700  
Springfield, MA 01115-5507

## Appendix A

### Financial Documents Submitted to the United States by the Settling Defendants

#### Financial Statements and Tax Returns

Consolidated and Audited Financial Statements for 2001 & 2000  
Consolidated and Audited Financial Statements for 2002 & 2001  
Consolidated and Audited Financial Statements for 2004 & 2003  
Federal Tax Return 2003  
Federal Tax Return 2004  
2000-2005 Financial Highlights  
Interim Internal Balance Sheet and Income Statement (as of 12/31/05)  
Interim Balance Sheet (as of July 16, 2006)  
Interim Income Statement (as of July 16, 2006)  
Erving Industries Inc. Pension Plans No. 1, 2, and 3 (3-Year Projection of ERISA  
Funding and Financial Reporting Expense)  
Four Charts re: Energy Cost, Expenditures, Efficiency, and Repair Spending

#### Additional Documentation

07/03/01	Letter from Fleet Bank
12/23/02	Loan Modification Agreement
05/05/03	Loan Agreement
06/17/03	Amendment No. 1 to Loan Agreement
04/16/04	Further Lending Agreement
08/31/04	Loan Modification Agreement, with Attached Pledge Agreement
10/31/05	Amendment to Modification Agreement
03/24/06	List of Banks and Finance Companies Contacted for Various Lending Arrangements
04/03/06	Erving Industries, Inc. Write-off Associated with TRI/Saugerties Packaging
04/03/06	Erving Industries, Inc. and Subsidiaries Proforma – 2006 P&L Budget
08/10/06	Narrative Explanation About the Casualty Loss (Primary Boiler Explosion) That Occurred at Erving Paper Mills, Inc. on 04/19/06, and its Financial Impact on Erving

## APPENDIX B

### INSURANCE INFORMATION

Erving Industries, Inc. (EII) and Baldwinville Products, Inc. (BPI) on information and belief describe below insurance policies that may have afforded liability coverage to the EII, BPI or both during the period from 1952 (year of incorporation of BPI) through 1991:

<b>Dates</b>	<b>Carrier</b>	<b>Policy Number</b>	<b>Type of Coverage</b>
1952 through 12/31/73	Liberty Mutual	Unknown	Unknown
1/1/74 through 1/1/1986	Liberty Mutual	Var. – Unknown	General Liability (Occurrence, with <b>Pollution Exclusion subject to Sudden and Accidental Exception)</b>
1/1/1986 through 1/1/1991	Liberty Mutual	Var. – Unknown	General Liability (Occurrence with <b>Absolute Pollution Exclusion)</b>
09/04/1985 through 1/1/1991	Liberty Mutual	Unknown	Pollution Liability (Claims Made)



## APPENDIX C

### **Statement of Work FOR CERTAIN SAMPLING WORK AT THE BIRCH HILL DAM SITE**

Pursuant to the Consent Decree to resolve the liabilities of Baldwinville and Erving to the United States Army Corps of Engineers ("the Corps") for Past Response Costs at the Birch Hill Dam Flood Control Project Site ("the Site"), Baldwinville and Erving (collectively "Settling Defendants") shall conduct monitoring of poly chlorinated biphenyls (PCBs) at the Site in accordance with the *Long-Term PCB Monitoring Protocol, Birch Hill Reservoir, Royalston, MA* (ENSR, March 2002), *as Revised* (Letter from Battelle, 15 November 2005). This PCB monitoring shall be undertaken by the Settling Defendants until completion of their obligations pursuant to an administrative consent order and notice of noncompliance ("ACO") with the Massachusetts Department of Environmental Protection ("MADEP") with respect to the Phase II and Phase III work required by the ACO.

The contractor retained by Settling Defendants shall be approved by the Corps prior to undertaking the required monitoring. All required work shall be conducted by the approved contractor. All work shall be performed under the direction of a Commonwealth of Massachusetts, Licensed Site Professional ("LSP").

Settling Defendants shall conduct the PCB monitoring in accordance with the *Long-Term PCB Monitoring Protocol, Birch Hill Reservoir, Royalston, MA* (ENSR, March 2002), *as Revised* (Letter from Battelle, 15 November 2005), including, but not limited to the following requirements:

The Corps shall provide oral notification to the Settling Defendants or their authorized agents that water elevations exceed the flood stage levels established in the applicable protocols as triggering the need for sampling and testing. The Settling Defendants shall be responsible to provide to the Corps and maintain as current one primary contact, one alternate, and one voice mail, recorded message or pager number to be used if the primary or alternate cannot be reached to receive notification from the Corps.

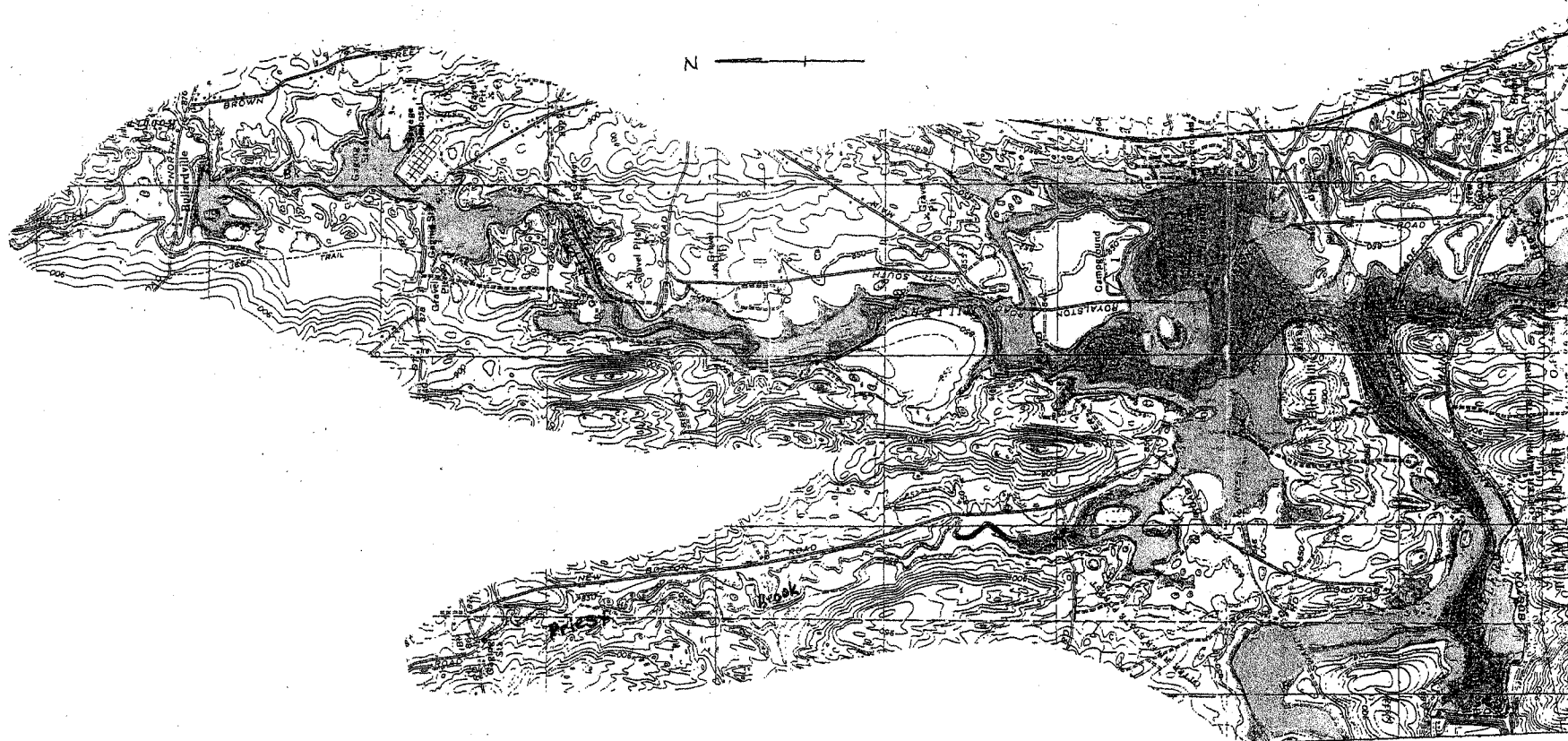
The Settling Defendants shall undertake sampling and testing of select locations on Site that are inundated during flood storage. The specifics of the procedures are defined in the *Long-term PCB Monitoring Protocol, Birch Hill Reservoir, Royalston, MA* (ENSR, March 2002), as revised by letter from Battelle, entitled: Revisions to the PCB Monitoring Protocol, Birch Hill Dam, Flood Control Project, Royalston, Massachusetts (RTN 2-664).

All work shall be conducted in compliance with guidelines set forth by the United States Environmental Protection Agency, the Commonwealth of Massachusetts, Occupational Safety and Health Act standards, and MCP (310 CMR40.0000).




Copies of all reports and results shall be provided to the Corps following any sampling event triggered under the protocol. Such reports and results shall be submitted not later than five weeks following the flood storage event.

Monitoring shall be conducted from the effective date of the Consent Decree until the review and approval by MADEP of the following reports by Settling Defendants: a Supplemental Phase II Comprehensive Site Assessment Report and a Phase III Remedial Action Plan for PCB contamination in the area of the Otter and Miller River.

The Corps shall provide Settling Defendants, and their agents and/or contractors, with reasonable access to the Site to perform the required sampling.



MATCH LINE FIGURE 4-2

-  ELEVATION 826.4 (FLOODED 9 OF 10 YEARS)
-  ELEVATION 833.4 (FLOODED 1 OF 5 YEARS)
-  ELEVATION 838.3 (FLOODED 1 OF 10 YEARS)

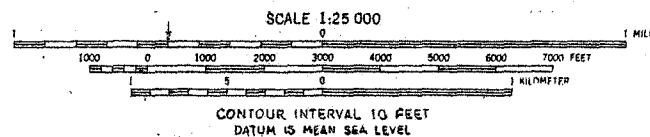


FIGURE 4-1  
FREQUENCY OF FLOODING  
AT THE  
BIRCH HILL RESERVOIR AREA  
(NORTHERN SECTION)

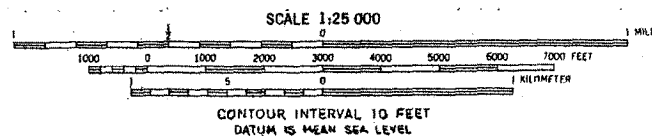
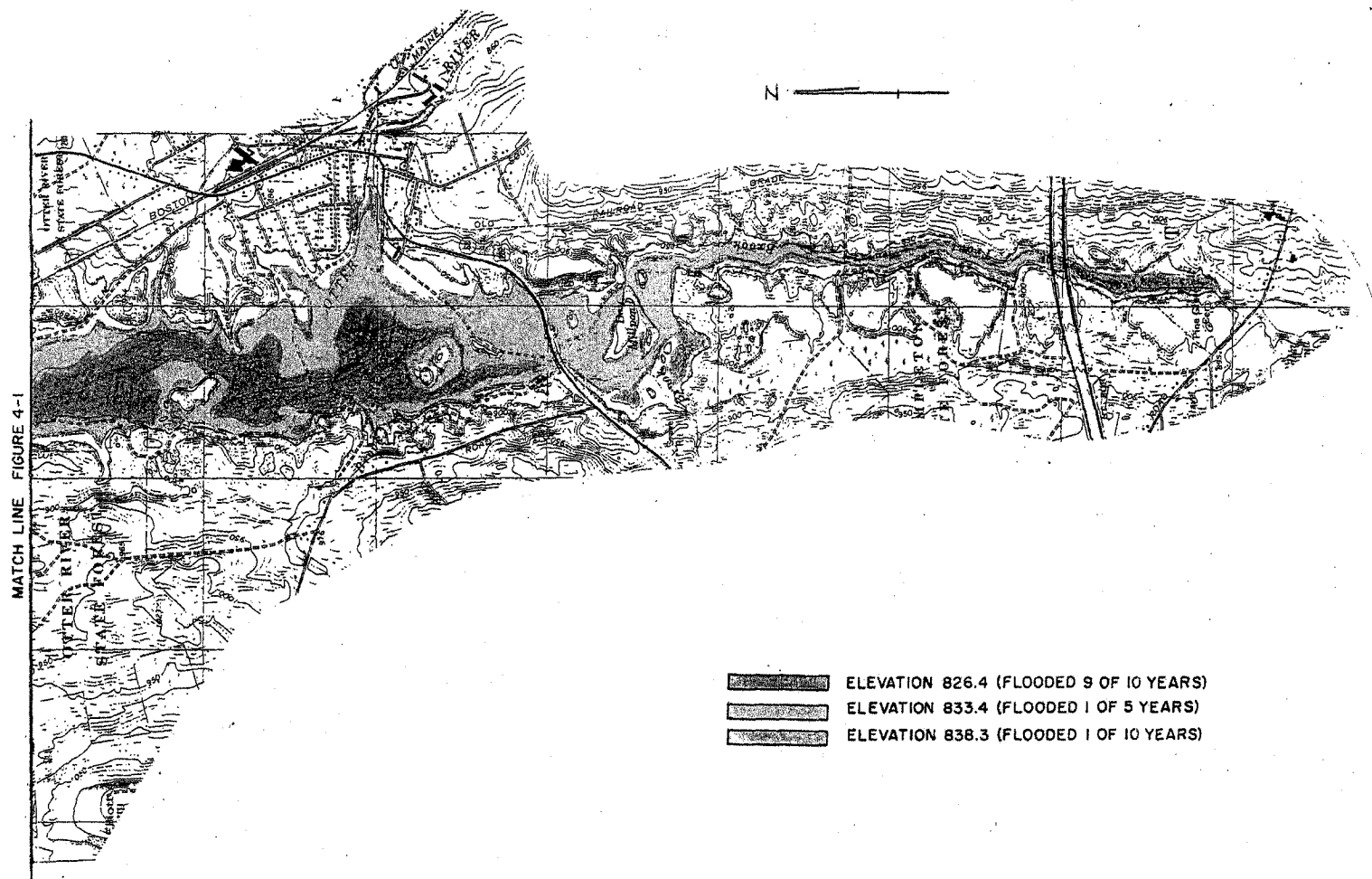


FIGURE 4-2  
FREQUENCY OF FLOODING  
AT THE  
BIRCH HILL RESERVOIR AREA  
(SOUTHERN SECTION)